

## SUBCHAPTER G—CONTRACT MANAGEMENT

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#### Subpart 342.3—Contract Administration Office Functions

##### 342.302 Contract administration functions.

(c)(1) In multiple-year contracts or orders, the OPDIV's Section 508 Official or designee, as well as the Contracting Officer and COTR, shall review and approve all Section 508 Annual Reports before the Contracting Officer makes final payment or any option is exercised under any applicable contract/order. In contracts/orders of 1 year or less in duration, the aforementioned officials shall review and approve the Section 508 conformance certification before final payment is made. The Contracting Officer also shall ensure that the report and all related approvals are

made a part of the official contract/order file.

(2) The Contracting Officer shall insert the clause in 352.242-70, Key Personnel, in solicitations and contracts when the Contracting Officer will designate contractor key personnel. *See FAR 35.015* for additional information regarding key personnel when contracting for R & D.

(3) The Contracting Officer shall insert the clause in 352.242-71, Tobacco-free Facilities, in solicitations, contracts, and orders when some or all of the contractor's performance (including construction services), will take place on HHS-owned or controlled properties. The clause shall not be included if performance requires only that contractor staff attend occasional meetings on HHS properties. In that case, contractor employees are considered "visitors." Further, for any proposed or existing construction contract or order, the Contracting Officer shall coordinate any exceptions to the policy, raised by an incumbent or potential contractor based on union or collective bargaining agreements, with the designated OPDIV tobacco-free policy contact point for final disposition.

(4) The Contracting Officer shall insert the clause in 352.242-72, Native American Graves Protection and Repatriation Act, in solicitations, contracts, and orders that require performance on Tribal lands or are for construction on Federal or Tribal lands.

#### Subpart 342.7—Indirect Cost Rates

##### 342.705 Final indirect cost rates.

(a) The Division of Cost Allocation, PSC, shall establish indirect cost rates, research patient care rates, and, as necessary, fringe benefit, computer, and other special costing rates for use in contracts awarded to State and local governments, colleges and universities, hospitals, and other nonprofit organizations.

(b) The Division of Financial Advisory Services, NIH, shall establish indirect cost rates, fringe benefit rates,

and similar rates for use in contracts awarded to commercial organizations.

### **Subpart 342.70—Contract Monitoring**

#### **342.7000 Purpose.**

Contract monitoring is an essential element of contract administration that the Contracting Officer and the COTR perform jointly. This subpart describes HHS' operating concepts.

#### **342.7001 Contract monitoring responsibilities.**

(a) The contract establishes the obligations of both the Government and the contractor. The Contracting Officer is the only person authorized to modify the contract and shall confirm all modifications in writing.

(b) The Contracting Officer shall ensure the contractor's compliance with all the terms and conditions of the contract. The Contracting Officer shall inform the contractor by letter (if not already stipulated in the contract) of the authorities and responsibilities of the Government personnel involved with the contract.

(c) The Contracting Officer shall use program, technical, and other personnel for assistance and advice in monitoring the contractor's performance and in other areas of post-award administration. The Contracting Officer shall ensure that these individuals understand and carry out their assigned responsibilities. The individual roles and corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of program and technical personnel in monitoring the contract is to assist and advise the Contracting Officer, and act as the COTR when so designated by the Contracting Officer. COTR activities include—

(i) Providing technical monitoring during contract performance and advising the Contracting Officer relating to delivery, acceptance, or rejection of deliverables in accordance with the terms of the contract;

(ii) Assessing contractor performance;

(iii) Recommending necessary changes to the schedule of work and period of performance to accomplish

the objectives of the contract (The COTR shall provide the Contracting Officer a written request along with an appropriate justification and a funding document, if additional funds are needed.);

(iv) Reviewing invoices/vouchers and recommending approval/disapproval by the Contracting Officer, including providing comments regarding anything unusual discovered in the review (*Note:* If a contract contains the Salary Rate Limitation clause specified in 352.231–70, the Contracting Officer, in conjunction with the COTR, shall monitor the contractor's invoices to ensure that the contractor is billing salaries, including those of subcontractors, at rates no higher than the Federal Executive Schedule salary rate limitation in effect on the date(s) the expense(s) was/were incurred.);

(v) Reviewing and recommending approval or disapproval of subcontractors, overtime, travel, and key personnel changes; and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The roles of the contract administrator, auditor, cost analyst, and property administrator are to assist or advise the Contracting Officer in post-award administration. Such activities include—

(i) Evaluating contractor systems and procedures, including accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, *etc.*;

(ii) Processing disputes under the Disputes clause and any resultant appeals;

(iii) Modifying or terminating the contract; and

(iv) Determining the allowability of: costs charged in incentive or cost-reimbursement type contracts, and progress payments under fixed-price contracts. This is important for awards to new organizations or those with financial weaknesses.

(d) The Contracting Officer shall ensure that contractor performance and contract monitoring conform with contract terms and conditions. If performance is not satisfactory or if problems

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are anticipated, the Contracting Officer shall take immediate action to protect the Government's rights under the contract. The Contracting Officer shall notify appropriate officials of problems that cannot be resolved within contract limitations and whenever the contractor is not meeting contract or program objectives. The notification shall include a statement of corrective actions that the Contracting Officer is taking.

### **342.7002 Procedures to be followed when a contractor fails to perform.**

(a) The Contracting Officer shall initiate immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting terms of the contract. Compliance with the reporting terms includes those reports the contractor is required to submit directly to the payment office. The payment office shall notify the Contracting Officer promptly when the contractor does not submit such a report on time.

(b) When the contract contains a termination for default clause, the contractor's failure to submit any report, perform services, or deliver work when required by the contract is considered a default in performance. The Contracting Officer shall immediately issue a formal 10-day cure notice pursuant to *FAR 49.607*. The notice shall include a statement to the effect that payments will be withheld if the default is not cured within the time period specified in the notice or if the default is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the Contracting Officer shall not initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the Contracting Officer shall initiate withholding action on all contract payments and shall determine whether termination for default or other action would be in the best interest of the Government.

(c) When the contract does not contain a termination for default clause, the Contracting Officer shall consider a contractor's failure to submit any required report, perform services, or de-

liver work when required by the contract a failure to perform. The Contracting Officer shall immediately issue a written notice to the contractor that: specifies the failure, and provides a 10-day period (or longer period if the Contracting Officer deems it necessary) within which the contractor shall either cure the failure or provide reasons for an excusable delay. The notice shall include a statement to the effect that payments will be withheld, if the default is not cured within the time period specified in the notice or if the default is not determined to be excusable.

(1) If the contractor cures the failure or the Contracting Officer determines it to be excusable, the Contracting Officer shall not initiate the withholding action.

(2) If the Contracting Officer does not determine the failure excusable or the contractor does not provide a response within the allotted time, the Contracting Officer shall initiate withholding action on all contract payments and shall determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The Contracting Officer shall consult *FAR subpart 49.4* for further guidance before taking any of the actions described in this section.

### **342.7003 Withholding of contract payments.**

#### **342.7003-1 Solicitation provisions and contract clauses.**

(a) The Contracting Officer shall insert the clause in *352.242-73*, Withholding of Contract Payments, and the clause in *FAR 52.249-14*, Excusable Delays, in solicitations and contracts when a cost-reimbursement, time-and-materials, or labor-hour contract is contemplated.

(b) The Contracting Officer shall insert the clause in *352.242-74*, Final Decisions on Audit Findings, in solicitations and contracts when a cost-reimbursement contract is contemplated, except for those contracts with:

(1) A foreign government or agency of that government; or

(2) An international organization or a subsidiary body of that organization that the HCA determines would not be appropriate.

**342.7003-2 Procedures to be followed when withholding payments.**

(a) When appropriate, the Contracting Officer shall withhold any contract payment when a required report is overdue or the contractor fails to perform or deliver required work or services. When making the determination to withhold contract payments in accordance with the Withholding of Contract Payments clause, the Contracting Officer shall immediately notify the servicing finance office in writing of the determination to withhold payments. The notice of suspension shall contain all information necessary for the finance office to identify the contract—i.e., contract number, task/delivery order number, and contractor name and address.

(b) The Contracting Officer shall immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the Contracting Officer shall immediately notify, in writing, all recipients of the notice of withholding that the withholding is to be lifted and contract payments are to be resumed.

(d) When taking any actions regarding the withholding of payments, the Contracting Officer shall not waive any of the Government's rights when corresponding with the contractor.

**Subpart 342.71—Administrative Actions for Cost Overruns****342.7100 Scope of subpart.**

This subpart sets forth the procedures to follow when a cost overrun is anticipated. A cost overrun occurs when the allowable actual cost of performing a cost-reimbursement type contract exceeds the total estimated cost specified in the contract.

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Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the Contracting Officer shall coordinate immediately with the appropriate

program office to determine whether the contract should be modified or terminated. If the Contracting Officer receives information from a source other than the contractor that a cost overrun is anticipated, the Contracting Officer shall verify the information with the contractor and remind the contractor of the notification requirements of the Limitation of Cost clause.

**342.7101-2 Procedures.**

(a) Upon notification that a cost overrun is anticipated, the Contracting Officer shall inform the contractor to submit a request for additional funds, which shall include the following:

- (1) Name and address of contractor.
- (2) Contract number and expiration date.
- (3) Contract item(s) and amount(s) creating overrun.
- (4) The elements of cost which changed from the original estimate—i.e., labor, material, travel, and overhead, to be furnished in the following format:
  - (i) Original estimate.
  - (ii) Costs incurred to date.
  - (iii) Estimated cost to completion.
  - (iv) Revised estimate.
  - (v) Amount of adjustment.
- (5) The factors responsible for the increase (e.g., error in estimate, changed conditions).
- (6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits a notice of a projected overrun, the Contracting Officer shall—

- (1) Immediately advise the appropriate program office and furnish the office a copy of the notice and any other data received;
- (2) Request audit or cost advisory services, and technical support, as necessary, for evaluation of information and data received; and
- (3) Maintain continuous communications with the program office to obtain: a timely written decision and justification to continue the contract with additional funds (including verification of funds availability); or a timely written decision and request to terminate the contract.

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(c) After receiving the decision by the program office, the Contracting Officer shall promptly notify the contractor in writing of the following:

(1) The specified amount of additional funds allotted to the contract.

(2) Work shall be discontinued when the allotted funds are exhausted, and any work performed after that date is at the contractor's risk.

(3) The Government is considering whether to allot additional funds to the contract and will notify the contractor as soon as possible, but that any work performed after the currently allotted funds are exhausted is at the contractor's risk. (Timely, formal notification of the Government's intention is essential to preclude loss of contractual rights in the event of dispute, termination, or litigation.)

(d) If the program office permits, the Contracting Officer shall refrain from issuing any contractual documents that require new work or an extension

of time, pending resolution of the projected overrun.

### 342.7102 Contract modifications.

(a) Modifications to contracts containing the Limitation of Cost clause shall include either—

(1) A provision which: Increases the estimated or ceiling amount in the Limitation of Cost clause of the contract; and states that such clause will thereafter apply to the increased amount; or

(2) A provision stating that the estimated or ceiling amount in the Limitation of Cost clause is not changed by the modification.

(b) The Contracting Officer shall not change a fixed-fee in a contract when funding a cost overrun. The Contracting Officer shall make changes in fixed-fee only to reflect changes in the SOW/PWS that justify an increase or decrease in fee.